90-65

Supreme Court, U.S.
FILED
JUL 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

GARY GLASS, TRANSFEREE, et al.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Arthur Pelikow
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New York, New York 10279

QUESTIONS PRESENTED

1. Whether a consent agreement to extend the time to assess tax under section 6501(c)(4) was valid to confer jurisdiction upon the Tax Court over a liquidated and dissolved corporation when the agreement bore no corporate signature.

2. When the United States Court of Appeals for the Second Circuit in a tax case has recognized the decision of the New York Court of Appeals as New York's leading authority on the subject of interest accrual in non-fraudulent transfers, may the Tax Court ignore such authority where this Court has held that state law determines the existence and extent of transferee liability.

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The other petitioners are:
Three G Trading Corp.,
Transferor and
Gary Glass and Dale Glass

In The

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GARY GLASS, TRANSFEREE, et al.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Court of Appeals affirmed by a summary order, Appendix A.1 (hereinafter "A.") the judgment (decisions) of the United States Tax Court on the opinions of that Court reported at T.C. Memo 1988-131 (A.4); T.C. Memo 1988-550 (A.17); and T.C. Memo 1989-387 (A.37).

JURISDICTION

The summary order of the Court Appeals was dated and entered on April 9, 1990 (A.1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Internal Revenue Code are set forth in pertinent part in statutory appendix.

STATEMENT OF THE CASE

This case involved two trials (three hearings) in the Tax Court and resulted in three opinions and decisions from that Court. The Court of Appeals rendered no opinion. It affirmed the judgment of the Tax Court on its opinions.

Three G Trading Corp. a New York corporation had adopted a plan of liquidation in September 1981 and was dissolved under New York law in June 1982. Gary Glass, a New York resident, was its sole shareholder and its president during Three G's existence.

The Internal Revenue Service (IRS), unable to complete its examination of Three G's September 30, 1980 tax return (1980 taxable year), prepared Form 872 (consent to extend the time to assess tax) as an agreement (executed in New York) between Three G and the IRS purporting to extend the time for assessment of tax for its 1980 taxable year to December 31, 1984 under section 6501(c)(4). Glass signed the agreement: "Gary Glass on September 26, 1983 only in the individual signature section of the form. No signature was given for the corpora-

tion in the corporate signature section, nor was there any indication of representative authority, i.e., president. By contrast, a similar form (consent) for 1978 and 1979 was signed by Glass in the corporate section: "Three G Trading, Gary Glass, former pres 11/24/82".

At the first trial, one of the issues for decision was whether the statute of limitations barred the assessment of income tax of Three G's 1980 tax year, and was presented to the Court by way of Three G's cross-motion for summary judgment.

The Tax Court in T.C. Memo. 1988-131 (A.4) held that Three G's 1980 waiver was, on its face, a valid agreement to extend the statute of limitations (id., A.13).

The period of limitations for Three G's 1980 taxable year would normally expire, under section 6072(b) of the Code on December 15, 1983, i.e., the 15th day of the third month following September 30, 1980, unless a valid extension was agreed to between Three G and the IRS.

The Tax Court relied on Eversole v. Commissioner, (by Judge Tannenwald) 46 T.C. 56, 61 (1966) and Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985), as authority to support its holding. It disregarded Glass's testimony (as self-serving) that he did not intend to agree to extend the statute of limitations for Three G's 1980 taxable year, irrespective of the absence of a corporate signature.

The Tax Court denied Three G's cross motion for summary judgment and upheld the validity of the consent agreement. Trial of the case on other issues proceeded. The prinicipal issue presented for decision in the second trial involved the deductability of certain losses. Except to report the opinion of the Court, at T.C. Memo. 1988-550, which ordered decisions under its Rule 155 (relating to tax computation) the issues determined in the second trial are not involved in this petition.

Because the petitioners and respondent disagreed on the tax computation under Rule 155, the Tax Court rendered a third opinion in T.C. Memo. 1989-387 (A.37). Its holding on the question of interest accrual is the second of the questions presented. It held (A.43) that "Gary Glass" liability for interest is governed by section 6601 (a), which provides that interest on any unpaid tax shall be paid for the period from the date the Three G returns were required to be filed to the date of payment".

The Tax Court had noted that Gary Glass (a transferee of Three G following its liquidation) had submitted a proposed decision for tax liability and had relied on New York law (id., at A.41-42). The Tax Court stated that "[h]is reliance on state law (and we express no opinion as to whether his analysis is correct) is misplaced".

The Court of Appeals affirmed (A. 2) the judgmemt of the Tax Court in an unpublished summary order, for the reasons stated by the Tax Court.

REASONS FOR GRANTING THE PETITION

Literally, many thousands of consent agreements are executed each year between the IRS and taxpayers. This consent, evidenced by a form prepared by the IRS, is the only written agreement which IRS and the taxpayer execute to extend the statute of limitations under under Code section 6501 (c)(4). Such agreement to extend the statute of limitation on assessment is not in the best interest of the taxpayer. Such agreement gains the respondent the advantage of additional time to determine and assess a tax, if any. Because such agreements are routinely and extensively obtained by the Internal Revenue Service, their execution should unmistakably express the intention of both parties to the agreement. An inferential interpretation favoring the Internal Revenue Service works an unfairness against the taxpayer, and confers upon the trial court an unwarranted notion of jurisdiction. Especially is this so when state law as announced by the State's highest court has declared the law to be otherwise.

1. NATURE OF WRITTEN AGREEMENT.

The written agreement to extend the time to assess tax is Form 872 (Consent to Extend the Time To Assess Tax), is prepared by the respondent and is routinely obtained by him, when he cannot determine and assess tax within the normal period of limitations.

The Tax Court cases dealing with the extension agreement (referred to as a waiver of the statute of limitations) recognize that contract principles are applicable because Code section 6501 (c)(4) requires that the parties reach a written agreement as to the extension. ***Pianulle v. Commissioner***, 80 T.C. 1035, 1042 (1983); ***Kronish v. Commissioner***, 90 T.C. 684 (1988); ***Estate of Robert S. Taft v. Commissioner***, 57 T.C.M. (CCH) 1291, 1294; ***Russello v. Commissioner***, 57 T.C.M. (CCH) 1126, 1128.

In *Kronish* (id. at 693) the Court held:

> "It is the objective manifestation of mutual assent as evidenced by the parties' overt acts and not the parties' secret intentions, that determines whether the parties have made an agreement. S. Williston, Contracts, secs. 22 and 35 (3d ed. 1957); 1 Restatement, Contract 2d, sec. 19 (1979); Pimpinello v. Swift & Co., 253 N.Y. 159, 162-163, 170 N.E. 530, 531 (1930) ... ." The "objective manifestation of mutual assent" is not present here.

At the time the waiver was signed, Three G was no longer in existence, and any tax determined against Three G as a taxpayer, could be collected from Glass as a transferee of its assets only if the statute of limitations in which to assess the tax against Three G were open. Absent a valid extension agreement between the IRS and Three G, no tax could be asserted against it. The agree-

ment, lacking a corporate signature, cannot be deemed an "objective manifestation of mutual assent" when the only signing was an individual one on the line intended for individual signature.

Because Three G, and Glass were New York residents, and the extension agreement was signed in New York, the relevant authority on contract interpretation would be the law of the State of New York in accordance with the teaching of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) and *Commissioner v Estate of Bosch,* 387 U.S. 456, 465 (1967).

2.. NEW YORK SUBSTANTIVE LAW.

The governing New York substantive law on contracts which affects this case has been declared by the Court of Appeals in *Salzman Sign Co. v. Beck,* 10 N.Y. 2d 63 (1961) and *Savoy Record Company, Inc. v. Cardinal Export Corp.*, 15 N.Y. 2d 1 (1964).

In *Salzman*, id., 65, the purchaser, a corporation, signed "Leslie 575 Corp. L.S., Irving Beck pres L.S". The Court noted: this, of course, was a corporate and not an individual signature. Quoting ¶5 of the contract, the Court referred to the agreement of the parties that "[w]here the purchaser is a corporation, in consideration of extending credit to it, the officer or officers signing on behalf of such corporation, hereby personally guarantee the payments hereinabove provided for."

The Court of Appeals affirmed the motion for summary judgment and noted that the three lower courts had held that the "contract clause although purporting to bind the purchaser's officers individually was not sufficient to charge the signing officer as a guarantor when his signature was not an individual one but as president". The Court held, id., at 67, "[i]n modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for the corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice - once as an officer and again as an individual ... [w]e think the better rule is the one used here - that is, *that the statement in the contract purporting to bind the signing officer individually is not sufficient for Statute Frauds purposes without some direct and explicit evidence of actual intent* (emphasis added).

A similar situation was presented by *Savoy Record Company*, id., at 1, which sought to collect unpaid royalties from an American corporate agent for a foreign company, on the grounds that the American agent (defendant) had guaranteed payment under the contract. The significant clause in question read: "Cardinal ... agrees by its signature to guarantee the payment of all moneys payable to Savoy Record Co. [by you - foreign company] under this contract." id., at 3. The Court citing *Salzman*, id., at 5, stated "[t]he "better rule" ... is that" the statement in the contract purporting to bind ... in-

dividually "the party signing in a representative capacity" is not sufficient for Statute of Frauds purposes without some direct and explicit evidence of actual intent" on his part to be so bound." In *Savoy*, id., at 6-7, the Court further stated "*the obligation of a guarantor is, admittedly, a heavy one, and the courts should refrain from foisting such an obligation upon a party, be he individual or corporation who simply signs as an agent, absent the requisite clear and unequivocal evidence, to be gathered from the writing itself, that he intended to assume such a liability.*" (emphasis added).

It didn't make any difference if Glass testified or not. Avoidance of subjective intent is accomplished by recognizing the dominance of the written agreement.

3.THE AUTHORITY RELIED UPON BY THE TAX COURT.

The Tax Court erroneously relied on two cases in its opinion that the waiver was valid on it face: *Eversole v. Commissioner*, 46 T.C. 56 (1966) and *Pleasanton Gravel Co. v. Commissioner*, 85 T.C. 839 (1985). Each case supports the view of a representative signing, but neither case is apposite.

The Tax Court's ultimate holding is a rejection of New York's substantive law so declared by its Court of Appeals that only "clear and explicit evidence of actual intent" can charge Three G with having signed a valid extension agreement.

Because the decision affects tax administration so pervasively, thousands of extension agreements being executed nationwide, the decision, if permitted to stand, would represent a subversion of state - federal law as envisaged by *Erie R.* and *Estate of Bosch*.

The second trial of this case followed after the Tax Court upheld the validity of the consent agreement against Three G, and denied Three G's motion for an interlocutory order under Code section 7482 (a)(2). This section is new to the 1986 Code and is similar to 28 U.S.C. 1292 (b). Grant of the motion would have permitted an appeal to the Court of Appeals and might have prevented the ensuing litigation.

The opinion of the Tax Court following the second trial is reported at T.C. Memo. 1988-550 (A.17). The issues presented therein, as previously noted, are not presented for the Court's consideration. The Court ordered decisions to be entered under Rule 155.

4. THE QUESTION OF INTEREST ACCRUAL IN NON-FRAUDULENT TRANSFERS.

The second question presented is whether Three G's tax deficiencies accrue interest from the due date of their respective returns, i.e., December 15 until the date of payment as the Tax Court held or whether in non-fraudulent transfers, interest does not accrue after the date of transfer until the date of demand.

Gary Glass was a transferee of Three G's assets following its liquidation.

Code section 6901 (a) provides a method by which the Commissioner may assess and collect tax against a transferee of property. The provision does not create or define the transferee's liability for taxes owed by the transferor. It merely provides a procedural device for collection once transferee liability has been established.[1] *Phillips v. Commissioner*, 283 U.S. 589 (1930); *Commissioner v. Stern*, 357 U.S. 39 (1958). Since 6901 is purely a procedural statute, the Court must look to other sources to define the transferee's substantive liability.

The Supreme Court has ruled that "the existence and extent of [transferee] liability should be determined by state law." *Commissioner v. Stern*, 357 U.S. 39, 45 (1958). (Emphasis added).

In the instant case, the Tax Court held that because the value of the transferred assets exceeded the amount

1 The IRS itself has recognized that transferee liability is determined by state law. The Internal Revenue Manual states that "IRC 6901 is strictly a procedural statute and has no bearing on the substantive liability of the transferee for the transferor's debts. The liability of the transferee still depends on state law. IRM 8(12) 2(1985).

of the transferor's liability, the transferor's liability for interest after the date of transfer is determined under the Internal Revenue Code. The Tax Court justified its decision by relying on *Lowy v. Commissioner*, 35 T.C. 393 (1960) and *Estate of Stein v. Commissioner*, 37 T.C. 945 (1962). It reasoned that interest on transferee liability is a question of the "amount" of the liability, which is determined by federal law; it is not a question of the "existence" of such liability, which is governed by state law. The Tax Court's reliance on *Lowy* and *Stein* was misplaced because they are contrary to the Supreme Court's holding in *Stern*. In *Stern*, the Court ruled that the "extent", as well as the "existence", of a transferee's liability is to be determined by state law. *Stern*, 357 U.S. at 45. The Tax Court entirely ignored Stern's use of the word "extent" by saying that interest on transferee liability is a question of "amount". The Tax Court effectively read the word "extent" out of the *Stern* decision. This Court did not differentiate transferees who received more than the amount of the transferor's liability from those who received less. Thus, *Lowy* and *Stein* are contrary to the unambiguous directive of the Court. Furthermore, a rule based on the value of assets received by the transferee has no basis in either the words of the statute or in its legislative history. See, H. Rept. No. 356, 69th Cong. 1st Sess. 44 (1926); and Sen. Rept. No. 52, 69th Cong., 1st Sess. 28-30 (1926).

In *Hartley F. Satnick*, T.C. Memo. 1979-97, the Tax Court in a Rule 155 opinion (by Judge Tannenwald) said:

Although the existence and extent of transferee liability is determined under state law (citing *Stern*) the amount of the liability - i.e. the deficiency in tax, additions to tax and applicable interests is determined under the Internal Revenue Code.

In *Gary Glass, Transferee et al*, T.C. Memo. 1989-387, the Court (A.37) said: "[r]elying on New York law, Gary Glass has submitted a proposed decision which provides for liability for interest until January 11, 1982 (the date of the distribution to him in liquidation of Three G) and that no further interest should accrue from that date until the date of demand for payment is made following the entry of decision".

Inexplicably, the Court now states that: "[h]is (Glass's) reliance on State law (and we express no opinion as to whether his analysis of New York law is correct) is misplaced", the opinion continued by saying: "It is well established that the amount of a transferee's liability, as distinct from the existence of such liability is determined under the Internal Revenue code..." The Tax Court recognized in Satnick that the existence and extent of transferee liability is determined under State law, citing *Stern*, but ignores *Stern* in this case.

The sole issue is the extent of transferee liability. For this, the Court instructs us to look to the law of the State of New York. Furthermore, the Court has also instructed us that when a state law is determinative of the applica-

tion of a federal statute, state law as announced by the highest court of the State is to be followed. *Commissioner v. Estate of Bosch*, id., at 465; and *Erie R. Co.* id., at 78.

5. New York Substantive Law On Non-Fraudulent Transfer

The New York Court of Appeals, in *MacIntyre v. State Bank of Albany*, 307 N.Y. 630 (1954), held that, in the absence of fraud, a "transferee is chargeable with interest...only from the date of demand, if there is a demand, otherwise from the commencement of suit" against the transferee. In MacIntyre, assignees for the benefit of creditors brought suit against the defendant bank to recover preferential transfers made by the debtor to the defendant. The assignees recovered the amount of the preferential payments, but interest did not begin to accrue until the date that action was commenced. The Second Circuit has recognized that *MacIntyre* is the leading New York case on the issue of interest on a transferee's liability. *Ruderman v. U.S.*, 355 F.2d 995 (2d Cir. 1966). The Court of Appeals in *Ruderman*, id., at 998, held that, under New York law, absent actual fraud, interest runs from the time of demand. (Since there was a finding of fraud in *Ruderman*, interest was assessed against the transferee from the date of the transfer.)

Fraud was neither asserted nor found to exist in the case at bar. Accordingly, pursuant to the law as established by the highest court of the State of New York,

interest cannot be assessed against Gary Glass until the date of demand.

A subsidary question, but one fairly included within the ambit of question 2, is the Tax Court's failure to follow the holding of *Jack E. Golsen*, 54 T.C. 742, (1970) as a result of Ruderman's recognition of MacIntyre as New York's leading authority that, absent actual fraud, (or constructive fraud) interest runs from the time of demand.

Golsen held, id., at 757, that "better judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that Court alone."

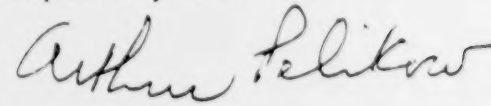
CONCLUSION

The petition for a writ of certiorari should be granted.

New York, New York

July 5, 1990

Respectfully submitted



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APPENDIX A

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of April, one thousand nine hundred and ninety.

PRESENT:

HONORABLE IRVING R. KAUFMAN

HONORABLE WILFRED FEINBERG

HONORABLE JOHN M. WALKER, JR.

Circuit Judges

GARY GLASS, et al.,

Petetitioners-Appellants,

-against- 89-4134

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Filed April 9, 1990

Appeal from the United States Tax Court.

This cause came to be heard on the transcript of record from the United States Tax Court, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said United States Tax Court is AFFIRMED.

1. Petitioners Gary Glass, et al., appeal from three decisions of the United States Tax Court, Theodore Tannenwald, J., all dated July 31, 1989, and from an order dated August 25, 1989. The Tax Court determined that Gary Glass, as transferee of the assets of Three G. Trading Corp., was liable for Three G.'s unpaid taxes and interest for its taxable years ending September 30, 1980, September 30, 1981 and June 30, 1982; fixed that liability at $902,433 for 1980, $37,588 for 1981 and $4,109 for 1982; decided that Gary and Dale Glass did not overpay their 1982 income tax liabilities; and denied appellants' motion for reconsideration.

2. We affirm for the reasons stated by Judge Tannenwald in his thorough opinions, unoficially reported at 55 T.C.M. (CCH) 489 (1988), 56 T.C.M. (CCH) 764 (1988) and 57 T.C.M. (CCH) 1117 (1989).

/s/ Irving R. Kaufman
IRVING R. KAUFMAN

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ John M. Walker, Jr.
JOHN M. WALKER, JR.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

T.C. Memo 1988-131

UNITED STATES TAX COURT

No. 5530-86

THREE G TRADING CORP., TRANSFEROR, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Filed March 28, 1988.

Arthur Pelikow, for the petitioner.

Roland Barral and *Jeannette D. Schmelzle* (specially admitted), for the respondent.

MEMORANDUM OPINION

TANNENWALD, *Judge*: This case is before us on respondent's motion for partial summary judgment and petitioner's cross motion for summary judgment. The issue for decision on respondent's motion is whether petitioner's losses on commodity futures trading are capital as a matter of law. The issue for decision on petitioner's cross motion is whether the statute of limitations bars assessment of Federal income tax for the taxable year ending September 30, 1980. Petitioner's cross motion was the subject of two hearings at which there was oral testimony supplementing the documentary material submitted with motion. Under this circumstance, we

treat the case as a complete record as to the statute of limitations issue and proceed to treat it as a severed issue. Cf *Carnation Milk Products Co. v. Commissioner*, 15 B.T.A. 556 (1929); Rule 141(b).[1]

Petitioner, Three G Trading Corp., was a New York corporation with a taxable year ending on September 30. On December 9, 1980, petitioner filed its Federal income tax return for the taxable year 1980.[2] Petitioner dissolved during the taxable year 1982. At all pertinent times, petitioner continued in existence for purposes of winding up its affairs, and Gary Glass (Glass), who was sole shareholder and president of petitioner, continued to represent in that activity.

Statute of Limitation Issue

1 All Rule references are to the Tax Court Rules of Practice and Procedure, and , unless otherwise indicated, all section references are to the Internal Revenue Code as amended and in effect during the years in issue.

2 We will refer to petitioner's fiscal years as taxable years without reference to the month and day on which they ended.

On November 24, 1982, Glass signed a Form 872 (Consent to Extend the Time to Assess Tax), as an agreement between "Three G Trading Corp. * * * and the District Director of Internal Revenue" extending the time to assess petitioner's Federal income tax for taxable year 1978 and 1979 to December 31, 1983. The area for the taxpayer's signature on the executed form appears as follows:[3]

YOUR SIGNATURE HERE _____

(Date signed)

SPOUSE'S SIGNATURE _____

(Date signed)

TAXPAYER'S REPRESENTATIVE _____

SIGN HERE _____

(Date signed)

CORPORATE _____

NAME ___[Three G Trading] _____

CORPORATE __[Gary Glass] [Former Pres] [11-2

OFFICER(S) Title Date si gnec

3 The material in brackets was handwritten on the three forms 872 involved herein.

SIGN HERE _____

Title (Date signed)

This form 872 was received by the Internal Revenue Service on November 26, 1982, and signed by Daniel Greegan (Creegan), a Group Manager, on November 29, 1982.

On September 26, 1983, Glass signed another Form 872, also as an agreement between "Three G Trading Corp. * * * and the District Director of Internal Revenue" purporting to extend the time for assessing petitioner's Federal income tax for the taxable year 1980 to December 31, 1984. The area for the taxpayer's signature on that executed form appears as follows":

YOUR SIGNATURE HERE [Gary Glass] [9-26-83]

(Date signed)

SPOUSE'S SIGNATURE _____

(Date signed)

TAXPAYER'S REPRESENTATIVE _____

SIGN HERE _____

(Date signed)

CORPORATE _____

NAME _____

CORPORATE _____

OFFICER(S) Title (Date signed)

SIGN HERE _____

Title (Date signed)

This Form 872 was received by the Internal Revenue Service on October 3, 1983, and signed by Creegan on October 5, 1983.

On December 4, 1984, Glass signed a third Form 872, also as an agreement between "Three G Trading Corp. * * * and the District Director of Internal Revenue" purporting to extend the time to assess petitioner's Federal income tax for taxable years 1978 through 1982 until December 31, 1985. The area for the taxpayer's signature on that executed form appears as follows:

YOUR SIGNATURE HERE _____

(Date signed)

SPOUSE'S SIGNATURE _____

(Date signed)

TAXPAYER'S REPRESENTATIVE _____

SIGN HERE _____

(Date signed)

CORPORATE _____

NAME _[Three G Trading Corp (A Liquidated Corp)] _____

CORPORATE	[Former Pres]	
OFFICER(S)	(Title)	(Date Signed)
SIGN HERE	[Gary Glass]	[12-4-84]
	Title	(Date signed)

This form was signed on behalf of the District Director by Michael Bernstein on December 6, 1984.

In general, taxes imposed by the Internal Revenue Code must be assessed within 3 years from the time that the return is filed. Sec. 6501(a). For purposes of determining the 3-year period, a return filed before its due date is deemed to have been filed on the due date. Sec. 6501(b)(1). The period for assessment may be executed by agreement, provided that such agreement is executed before the period for assessment, or that period as ex-

tended by another agreement, has expired. Sec. 6501(c)(4).[4] Respondent has the burden of proving that such an exception to the statute of limitations applies. Miami Purchasing Service Corp. v. Commissioner, 76 T.C. 818, 823 (1981). A facially valid extension agreement, however, shifts to petitioner the burden of proving that it is invalid. Pleasonton Gravel Co. v. Commissioner, 85 T.C. 839, 854 (1985).

The statute of limitations on petitioner's taxable year 1980 would have expired on December 15, 1983. See secs. 6072(b), 6501(b)(1). Respondent issued his notice of deficiency on December 4, 1985. Thus, absent a timely agreement extending the period within which to assess tax, assessment would be barred by the statute of limita-

4 In relevant part, that subsection provides: (4) EXTENSION BY AGREEMENT. -- Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title * * * both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. Section 6501(c)(4).

tions. Petitioner concedes that Glass had the authority on its behalf to execute an agreement extending the statute of limitations.

Petitioner contends that the first agreement with respect to 1980 (the second Form 872 signed by Glass) did not extend the statute of limitations because Glass intended to and did sign it in his individual capacity, rather than as a representative of petitioner. As evidence of this, petitioner points to both Glass' testimony and to the fact that Glass signed the Form 872 in the space for an individual's signature rather than in the space provided for a corporate signature.[5] Respondent, on the other hand, contends that Glass's signature was a valid exercise of his authority, and that, in any event, petitioner is now estopped to deny the validity of the agreement.

We turn first to the question of whether the agreement is valid on its face, or whether, by signing the Form 872 in the space for an individual taxpayer's signature and without any indication of his title or other authority, Glass nevertheless waived the statute of limitations on

5 If the first 1980 agreement is not valid, the second 1980 agreement also would not be valid because it would not have been executed within the time provided for assessment. Sec. 6501(c)(4).

behalf of petitioner. We hold that the agreement is valid on its face.

To be valid, an agreement extending the statute of limitations need not executed perfectly, although respondent bears the risk of material defects in execution if he relies on such an agreement. *Eversole v. Commissioner*, 46 T.C. 56, 61 (1966); cf. *Sanderling, Inc. v. Commissioner*, 66 T.C. 743, 752 (1976), affd 571 F.2d 174 (3d Cir. 1978). In *Eversole*, we were faced with the question whether a waiver addressed to "Estate of John T. Eversole, Deceased and Mrs. Ina Eversole, surviving wife" and signed "Estate of John T. Eversole, Deceased and Mrs. Ina G. Eversole, Surviving Wife" by "Ina Eversole" was valid not only as to Ina Eversole individually but also as to the estate. We rejected the taxpayer's contention that the waiver was invalid as against the estate because she did not indicate that she was signing in a representative capacity as well as on her own behalf. We emphasized that "at no time was anyone, other that Ina, the representative of the estate." 46 T.C. at 61. We distinguished *Carnation Milk Products Co. v. Commissioner*, *supra*, heavily relied on by petitioner herein, on the ground that a second entity different from the taxpayer had signed the agreement pointing out that the issue in *Carnation* was *who* signed, while in *Eversole* the issue was "*how* (in what capacity)" it was signed. 46 T.C. at 61 (emphasis in original). The same distinction applies herein, since there is no question that Glass was authorized to sign on behalf of petitioner.

In *Pleasanton Gravel Co. v. Commissioner*, 85 T.C. at 854, we held that the failure to include the name of the taxpayer-corporation with the signature of its president constituted a mere clerical error which did not invalidate the waiver. The agreement in that case was one of a series, the others of which had been properly executed. 85 T.C. at 854. Here, although it was the first agreement for the taxable year 1980, the agreement was the second of three addressed to petitioner and executed by Glass on behalf of petitioner, the other two having been executed in strict compliance with the form.

We are satisfied that, in light of *Eversole* and *Pleasanton Gravel*, the waiver herein in respect of 1980 is on its face a valid agreement extending the statute of limitations. Petitioner therefore has the burden of proving it invalid. The only evidence offered by petitioner is Glass's testimony that, when he signed the waiver, he intended to sign on his behalf and not on behalf of petitioner and that he signed only after consulting with his counsel. There is conflicting testimony as to the means by which Glass received the waiver, i.e., in person from the revenue agent (according to Glass) or from his and petitioners's accountant (according to the revenue agent who testified from his activity log that the waiver was given to the accountant). The mail method is consistent with respondent's normal procedure for soliciting extension agreements. Petitioner offered no evidence other than Glass's self-service testimony; neither the accountant nor the counsel having been called to corroborate

Glass's assertions. Under these circumstances, we are not required to accept Glass's testimony as gospel. See *Tokarski v. Commissioner*, 87 T.C. 74, 77 (1986). We hold that petitioner has failed to carry its burden of proving the waiver invalid. Under these circumstances, we need not deal with respondent's alternative estoppel theory.

Ordinary versus Capital Loss Issue

Petitioner reported $3,321,200 in ordinary loss during taxable year 1980. There is no dispute that the source of this loss was trading in commodity futures contracts. Petitioner also reported $3,237,260 of ordinary income in taxable year 1980, which it offset against this loss. Respondent disputes petitioner's assertion that the source of the income was also commodity futures contracts trading.

Under section 1221, commodity futures contracts are capital assets even though a taxpayer may be in a trade or business with respect to his dealing in such contracts. The only exception is where the taxpayer holds the property in question "primarily for sale to customers in the ordinary course of his trade or business," i.e., as a

dealer. *Smith v. Commissioner*, 33 T.C. 465, 483-483 (1959), affd. in part and revd. in part on other issues 313 F.2d 724 (8th Cir. 1963); see also *Vickers v. Commissioner*, 80 T.C. 394 (1983).[6] It is clear that petitioner was not a dealer in commodity futures contracts during the taxable year in question because a dealer requires customers and petitioner concedes that it had no customers. See *King v. Commissioner*, 89 T.C. 445, 458 (1987). Petitioner also concedes that it did not acquire any commodity futures contracts under circumstances that might categorize them as hedges so as to be within the ambit of *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955).[7] In view of the foregoing, it is clear that are no disputes as to the facts relevant to characterizing any otherwise deductible losses[8] as capital or ordinary, so that summary judgment is appropriate on this issue. See Rule 121(b). Therefore, to the extent that petitioner had

6 See also *LaBorde v. Commissioner*, T.C. Memo. 1988-58; *Swartz v. Commissioner*, T.C. Memo. 1987-52, and cases collected therein.

7 We note that any more expansive reading of *Corn Products* has been rejected. *Arkansas Best Corp. v. Commissioner* ____U.S.____ (March 7, 1988, No. 86-751).

8 Respondent has reserved the right to dispute the bona fides of petitioner's commodity futures transactions on which it claims losses.

otherwise deductable losses in respect of commodity futures contracts, they are capital losses. In addition, to the extent that any amount reported by petitioner as ordinary income was derived from trading in commodity futures contracts, we hold that those gains are capital gains.

To reflect the foregoing,

An appropriate order will be issued.

APPENDIX C

T.C. Memo. 1988-550

UNITED STATES TAX COURT

GARY GLASS, TRANSFEREE, ET AL.,[1] Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 5529-86, 5530-86, 27170-86

Filed December 5, 1988.

Arthur Pelikow and *Larry Kars*, for the petitioners.

Roland Barral and *Jeannette D. Schmelzle*, for the respondent.

1 Cases of the following petitioners are consolidated herewith for trial, briefing and opinion: Three G Trading Corp., Transferor, docket No. 5530-86, and Gary Glass and Dale Glass, docket No. 27170-86

MEMORANDUM FINDINGS OF FACT AND OPINION

TANNENWALD, *Judge*: Respondent determined the following deficiencies in petitioners' Federal income tax:

Docket No.	Petitioner	Year Ended	Deficiency
5530-86	Three G Trading Corp., Transferor	Sept. 30, 1980	$1,325,876
		Sept. 30, 1981	37,588
		June 30, 1982	4,276
5529-86	Gary Glass, Transferee	Sept. 30, 1980	1,325,876
		Sept. 30, 1981	37,588
		June 30, 1982	4,276
27170-86	Gary Glass and Dale Glass	Dec. 31, 1982	298,624

By Amendment to answer, respondent determined that there is a deficiency due for 1982[2] from Three G Trading Corp., Transferor, and Gary Glass, Transferee, of

2 We will refer to Three G Trading Corp.'s fiscal years by the year in which they ended.

$938,892, with respect to the nonapplication of section 337[3] to the 1982 transactions involved herein, and that, under section 6621(c), part of the deficiencies for each year were substantial underpayments attributable to tax-motivated transactions so that Three G Trading Corp., Transferor, and Gary Glass, Transferee, are liable for interest on such part at 120 percent of the statutory rate.

After concessions, the issues for decision are whether Three G trading Corp. is entitled to deduct certain losses incurred in trading commodity futures contracts during 1980, and, if so, whether it is required to recognize certain gain realized from trading commodity futures contracts during 1982 and whether part or all of the underpayment, if any, for 1980 is attributable to a tax-motivated transaction.[4]

Some of the facts have been stipulated. The stipulation of facts and attached exhibits are incorporated

3 Unless otherwise indicated, all section references are to the Internal Revenue Code as amended and in effect during the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

4 Respondent has conceded that there is no deficiency due from Gary and Dale Glass in docket No. 27170-86.

herein by reference. For convenience, we have combined our findings of fact and opinion.

Three G Trading Corp. (hereinafter referred to as petitioner) was a New York corporation with taxable year ending September 30, and Gary Glass and Dale Glass were residents of Merrick, New York, at the time their petitions were filed.

Petitioner dissolved on June 30, 1982, pursuant to a plan of liquidation adopted on September 30, 1981. Mr. Glass was president and sole shareholder from its inception to its dissolution. All of its assets, subject to liabilities, were distributed to Mr. Glass on June 30, 1982. The parties have stipulated that Mr. Glass was transferee of petitioner for Federal income tax purpose.

From December 15, 1975, through December 31, 1981, petitioner was a clearing member of the New York Mercantile Exchange (NYMEX). It had no customers, maintained no inventory of commodity futures contracts and did not engage in hedging operations. During the years in issue, Mr. Glass was a member of the Commodity Exchange, Inc. (COMEX) and NYMEX. Mr. Glass traded commodities futures contracts only for petitioner during the years in issue.

A commodity futures contract is a commitment to deliver or receive a specified quantity of a commodity during a designated future month. Where a person sell-

ing a commodity futures contract is obligated to deliver the commodity, it is known as a short position. Where a person buying a commodity futures contract is obligated to accept delivery, it is known as a long position. The obligation to accept or make delivery may be avoided by purchasing or selling an offsetting contract.

A straddle[5] is a simultaneous holding of a long and a short position (each of which is a leg) in the same commodity for different delivery months. A long straddle is a straddle where the distant leg (that is, the leg with the later delivery month) is the long position; a short straddle is one in which the distant leg is short. A straddle has less risk than an outright position, because the prices for each leg tend to move together. The price at which the straddle trades is the differential between the prices of the two legs; prices for the individual legs are set by the traders, and under the COMEX rules must fall within the daily trading range of prices for each leg. A butterfly straddle

5 The parties use the synonymous term "spread" to refer to straddle positions. Because the relevant case law and statutes use the term "straddle," we will use that term as well. See *Perlin v. Commissioner*, 86 T.C. 388, 391 n. 8 (1986).

is a combination of two straddles with the middle legs, either both long or both short, in the same month. A butterfly straddle typically has less risk than a straddle.[6]

On its Form 1120 (Corporation Income Tax Return) for 1980, petitioner reported ordinary income of $3,237,260 and ordinary loss of $3,321,200, for a net loss of $83,940. If allowable, the loss is a capital loss. See *Three G Trading Corp., Transferor v. Commissioner*, T.C. Memo. 1988-131. The parties agree that the reported ordinary income represents capital gain from trading commodity futures contracts not related to the transactions involved herein.

6 For a more complete description of trading commodity futures contracts and the strategy thereof, see *Smith v. Commissioner*, 78 T.C. 350, 354-357 (1982). See also *Perlin v. Commissioner*, *supra* at 391-394.

Petitioner's claimed loss arose from a series of trades, including straddles and butterfly straddles, in gold futures contracts, all of which were executed on COMEX and cleared through Heinold Commodities, Inc. (Heinold).[7] All of the trades, except for the January 19, 1982 trades, were executed personally by Mr. Glass on petitioner's behalf. Each trade was entered into after open outcry on the COMEX trading floor, and prices assigned to the legs were within the limits imposed by COMEX. Each required margin, and petitioner complied with the COMEX margin requirements.

On June 13, 1980, petitioner entered into the following contracts:

Description	Number	Contract	Price[8]	New/Offset[9]
Sold	200	December 1981	702.00	New
Bought	400	February 1982	713.00	New

7 None of petitioner's transactions executed on NYMEX are at issue.

8 Each contract represent 100 ounces of gold. Prices are quoted in dollars per ounce.

9 The column indicates for all transactions involved herein whether the trade opened a new position or was an offset that closed a position already held.

Sold	200	April 1982	724.00	New

The trader opposite in each of these trades was Richard Buccellato (Buccellato), who was trading for three accounts, one of which was his own. These contracts created a butterfly straddle.

On June 30, 1980, petitioner entered into the following transactions:

Description	Number	Contract	Price	New/Offset
Sold	200	October 1981	756.00	New
Sold	200	October 1981	758.00	New
Bought	200	December 1981	770.00	Offset
Bought	200	April 1982	801.00	Offset

The trader opposite petitioner in each of these trades was Milton Kaufman (Kaufman). These transactions closed one of the two straddles that had made up the butterfly straddle entered into on June 13, 1980, leaving one open

straddle (short 400 in October 1981 and long 400 in February 1982). Petitioner claimed a loss of $2,900,600 on these transactions.[10]

On July 2, 1980, petitioner entered into the following transactions:

Description	Number	Contract	Price	New/Offset
Bought	200	October 1981	765.00	Offset
Bought	200	October 1981	770.00	Offset
Sold	200	December 1981	784.00	New
Sold	200	April 1982	808.00	New

The trader opposite petitioner in these transactions also was Kaufman. These transactions closed the October 1981 leg of the straddle that had resulted from the June 30, 1980, transactions and put back the butterfly that had been opened on June 13, 1980. The prices of the contracts for December and April were, however, higher.

10 Gain or loss is the difference between the price per ounce in the opening contract and the price per ounce in the closing contract, multiplied by the number of contracts and the number of ounces per contract. All loss and gain figures also include transaction costs, which were $1.50 per closed position (that is, transaction costs were paid only when offsetting a position, not when opening a new position).

Petitioner claimed a loss of $420,600 on these transactions, for a total loss in 1980 of $3,321,200.

As of July 2, 1980, the settlement prices, which are the prices used to clear trades with the exchange's clearinghouse and are based on the range of closing prices for all contracts and delivery months, of the contracts making up the legs of the butterfly straddle held by petitioner were as follows:

Contract	Settlement Price
October 1981	$778.00
December 1981	792.00
April 1982	806.40

These prices resulted in an open trade equity (the sum of the products of the differences between the prices assigned to the legs and the settlement prices multiplied by the number of contracts and the number of ounces involved in each contract[11]) of $3,320,000.

Subsequently, on November 20, 1981, petitioner entered into the following transactions:

Description	Number	Contract	Price	New Offset

11 For example, the open trade equity of the December 1981 leg was (784 - 792.20) x 200 contracts x 100 ounces per contract.

Bought	200	December 1981	397.64	Offset
Sold	242	February 1982	404.32	Offset
Bought	42	June 1982	419.00	New

These transactions closed one straddle of the butterfly straddle entirely, partially closed another and opened a new straddle partially to replace the one that had been closed. Petitioner held a "tilted" butterfly--one in which one leg has fewer contracts than the other--at this point, because it held 158 February 1982 contracts and 42 June 1982 contracts. The net gain on the transactions was $256,481 in 1982.

On January 19, 1982, petitioner closed out the butterfly straddle, put in place on November 20, 1981, as follows:

Description	Number	Contract	Price	New/Offset
Sold	158	February 1982	379.30	Offset
Bought	158	April 1982	386.40	Offset
Bought	42	April 1982	386.50	Offset
Sold	22	June 1982	394.40	Offset
Sold	20	June 1982	394.50	Offset

The net gain on these transactions was $3,055,400.

Petitioner's overall net loss on the entire series of transactions set forth above was $9,319.

During the period from October 1, 1979, through June 30, 1982, there were no investigations undertaken by the COMEX against either petitioner or Mr. Glass.

The threshold question that we must face is whether the loss claimed by petitioner in 1980 is allowable. Section 108 of the Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 494, 630, as amended by the Tax Reform Act of 1986, sec. 1808(d), Pub. L. 99-514, 100 Stat. 2085, 2817, which we will refer to as section 108, provides in pertinent part:

> (a) General Rule.--For purposes of the Internal Revenue Code of 1954, in the case of any disposition of 1 or more positions--
>
> (1) which were entered into before 1982 and form part of a straddle * * *
>
> any loss from such disposition shall be allowed for the taxable year of the disposition if such loss is incurred in a trade or business * * *
>
> (b) Loss Incurred in a trade or business.--For purposes of subsection (a), any loss incurred by a commodities dealer in the trading of commodities shall be treated as a loss incurred in a trade or business.

We note at the outset that, for purposes of the transactions herein, the term "dealer" has two different definitions. First, for purposes of characterizing gains and losses as capital or ordinary, a person is a dealer if he has customers. *King v. Commissioner*, 89 T.C. 445, 458 (1987); *Three G Trading Corp., Transferor v. Commissioner*, *supra*. Second, for purposes of section 108, a commodities dealer is "a person who is actively engaged in trading section 1256 contracts and is registered with a domestic board of trade which is designated as a contract market by the Commodities Futures Trading Commission." Sec. 1402(i)(2)(B), cited in sec. 108(f). Thus, one can be a dealer for purposes of section 108 but not a dealer for the purpose of categorizing gains and losses. *King v. Commissioner*, 89 T.C. at 459 n.6.

Respondent has conceded that if section 108 applies, petitioner's losses are allowable.[12] For section 108 to apply however, petitioner must establish that the transactions were not ficititous, prearanged or in violation of the rules of COMEX. *Katz v. Commissioner*, 90 T.C. 1130 (1988); *Cook v. Commissioner*, 90 T.C. 975, 984-985 (1988).

Respondent has not asserted that any of the COMEX transactions involved herein were fictitious, that is, that

12 In his trial memorandum, respondent states "respondent will not require petitioner to prove the * * * elemeats of being in a trade or business of trading commodities. Consequently, if petitioner's trades were found to be bona fide (not prearranged), the losses therefrom would be allowable as incurred in a trade or business under section 108."
In his brief, respondent seeks to withdraw the concession. We are not inclined to accept such withdrawl, however, as it

(footnote continued from previous page)

confirmation of our holding in Three G Trading Corp. v. Commissioner, T.C. Memo. 1988-131, that the gains and losses involved herein were capital and not ordinary and was not intended to extend to the section 108 definition of dealer. Moreover, we note that, after the stipulation was filed, respondent's counsel stood mute when, in response to a question from the Court,petitioner's counsel stated "The Respondent has conceded section 108 if the losses are held to be bona fide.

they did not take place. Respondent does argue that, based on the pattern and timing of the trades, as well as the alleged fact that they did not take place. Respondent does argue that, based on the pattern and timing of the trades, as well as the alleged fact that they did not have a profit potential, the transactions were prearranged. Petitioner argues that the testimony of the two principal persons with whom he made the trades involved herein, the place and manner in which the trades were executed, and the prices at which they were executed, shows that the trades were not prearranged. Whether the transactions were prearranged is a question of fact; petitioner bears the burden of proof. *Katz v. Commissioner*, 90 T.C. at 1136; Rule 142(a).

Mr. Glass testified that he made no agreements concerning the trades at issue. We found much of his testimony, however, to be vague in several respects, particularly as to the specific reasons for entering into the straddles involved herein.

Moreover, he failed to remember many details, particularly those involving asserted sanctions by the Commodities Futures Trading Commission, which respondent attempted to prove for impeachment. While we do not believe that the alleged violations impeached Mr. Glass's credibility (particularly since respondent did not offer in evidence the documentary material which he used to cross-examine Mr. Glass in this respect), we are not required to accept Mr. Glass's testimony as gospel.

See *Fleischer v. Commissioner*, 403 F.2d 403, 406 (2d Cir. 403, 406 (2d Cir. 1968), affg. a Memorandum Opinion of this Court; *Leong v. Commissioner*, T.C. Memo. 1977-19, affd. without published opinion 573 F.2d 1291 (2d Cir. 1977).[13] We therefore will consider the objective evidence.

At the outset, we recognize that, generally, in determining whether a commodity straddle activity was entered into for profit, consideration is given to the entire scheme. See, e.g., *Glass v. Commissioner*, 87 T.C. 1087, 1174 (1986), affd. sub nom. *Yosha v. Commissioner*, ___F.2d___ (7th Cir., Nov. 8, 1988). But we are satisfied that this rule is not absolute and that it does not preclude examining separate steps in a series of transactions, see

13 Petitioner's reliance on the testimony of the persons with whom he made the trade is misplaced, as neither's testimony pertained to the trades at issue herein.

87 T.C. at 1175-1176, particularly where the issue is determining the existence of prearrangement, even though the profit objective may be one element.

Although the facts that a transaction was executed by open outcry on a regulated exchange, cleared through normal channels, and priced within the daily limits imposed seem to indicate that it was not prearranged (see *King v. Commissioner*, 87 T.C. 1213, 1217 (1986); *Perlin v. Commissioner*, 86 T.C. 388, 416 (1986)), these elements are not determinative.[14]

We find that, with respect to the June 30, 1980, and the July 2, 1980, transactions, the objective evidence is sufficient to overcome the other evidence of record that indicates that the transactions were not prearanged. Several facts influence this finding. First, all the transactions on these days were executed with Kaufman as the opposite trader. Thus, his results were an exact mirror of

14 Petitioner's make much of the fact that COMEX authorities neither imposed nor threatened sanctions in respect of, nor threatened sanctions during, the time period up to petitioner's liquidation. We give this fact only minimal weight in determining whether the transactions involved herein were prearranged, however, because the record does not reveal whether any such actions were taken after petitioner's liquidation or by some authority other than the exchange, e.g., the Commodities Futures Trading Commission.

petitioner's. Second, from Kaufman's perspective, the transactions produced a complete wash in results (ignoring transaction costs)--that is, the gain on the October legs is equal to the loss on the December and April legs. Similarly, if petitioner had not had the open positions from the June 13, 1980, transactions, it would have had wash results on the June 30 and July 2 transactions. To be sure, because some of the June 30 transactions offset positions from some of the June 13 transactions (the February 1982 position remained unaffected), petitioner seemingly realized a loss while being left with the potential for gain remaining in the newly acquired (December 1981 and April 1982 legs), albeit subject to the risk of the market. But the fact of the matter is that after the June 30 and July 2 transactions were completed, petitioner was in the identical position in which it had been immediately prior to June 30, i.e., as it had been as a result of the June 13 transactions. Furthermore, petitioner's open trade equity was exactly equal to its claimed losses less transaction costs. Petitioner made no attempt either through Mr. Glass's testimony or on brief to deal specifically with any of these elements of the June 30 and July 2 transactions. In short, petitioner had no profit motive in entering into the June 30 and July 2, 1980, transactions and thus fails to meet the standard of *Cook v. Commissioner*, supra, namely that, for the purpose of section 108(b), a transaction need not be entered into primarily for profit and that a commodities dealer need only show that there was some profit potential in order to avoid the curse of "prearrangement." See 90 T.C. at 985-986. See also *Yosha*

v. Commissioner, ___F.2d___, ___ (7th Cir., Nov. 8, 1988) ("A transaction not 'entered into for profit' is, at the least * * * a transaction that lacks economic substance."). We view this case as reflecting the same lack of any profit motive which existed in *Glass v. Commissioner, supra,* and which was the foundation of our holding in Cook.

We hold that petitioner has not met its burden of showing that the June 30 and July 2 transactions were not prearranged, so that those transactions should be disregarded in determining the tax consequences of petitoner's commodity futures activity.[15]

Respondent also argues that section 108 should not apply because these trades were wash trades and they were non-competitive. Both situations would be violations of the COMEX rules and as such would constitute an independent ground for disallowing the claimed losses. In view of our holding that the June 30 and July 2

15 As a result, there should be no adjustment for petitioner's related transaction costs nor anyclaim for higher cost for determining gain or loss from the subsequent closing of the December 1981 and April 1982 legs.

transactions were prearranged, we find it unnecessary to resolve the question of whether any of these transactions violated the COMEX rules.

With respect to 1982, respondent has conceded that the gains for that year should be reduced by the losses disallowed for 1980. See *Glass v. Commissioner*, 87 T.C. at 1177. The result of this concession is to eliminate any gain for 1982.[16] To the extent that there may be a net loss for 1982, it will not be recognized by virtue of section 337, and we do not understand that petitioner would contend otherwise. With respect to the further application of section 337 claimed by respondent, his position was predicated upon our recognition of the June 30 and July 2, 1980, transactions which respondent contends would have produced a locked-up profit to petitioner prior to the adoption of the place of liquidation on September 30, 1981--a profit that, according to respondent, would have constituted an assignment of income upon petitioner's liquidation and therefore without the scope of section 337. Compare *Carborundum Co. v. Commissioner*, 74 T.C. 730, 740-742 (1980), and *S.C. Johnson & Son, Inc. v. Commissioner*, 63 T.C. 778 (1975), with *Peterson v. United*

16 The net gains for 1982 were $3,055,400, and we have disallowed losses of $3,320,000 for 1980. The impact of the concession and our decision on 1981 can be accounted for in the Rule 155 computation.

States, 723 F.2d 43 (8th Cir. 1983). In view of our holding that the June 30 and July 2 transactions should be disregarded, this section 337 issue is mooted.

We turn to respondent's determination that petitioner is liable under section 6621(c) for interest on the underpayment at 120 percent of the statutory rate. That section provides that additional interest will be due if a "substantial underpayment" is attributable to a "tax motivated transaction." Certain transactions are deemed to be "tax motivated" by section 6621(c)(3), including "any straddle." Sec. 6621(c)(3)(A)(iii). Petitioner's disallowed losses were attributable to straddles. Therefore, we find that this was a tax-motivated transaction, and respondent is entitled to additional interest on the interest accruing on the portion of the underpayment attributable to such transaction after December 31, 1984. See *Patin v. Commissioner*, 88 T.C. 1086, 1129 (1987), affd. without published opinion sub nom. *Hatheway v. Commissioner*, 856 F.2d 186 (4th Cir. 1988).

To reflect the foregoing,

Decisions will be entered under Rule 155.

APPENDIX D

T.C. Memo. 1989-387

UNITED STATES TAX COURT

No. 5529-86, 5530-86, 27170-86

GARY GLASS, TRANSFEREE, ET AL.,[1] Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Filed July 31, 1989.

Arthur Pelikow and *Larry Kars*, for the petitioners.

Roland Barral and *Jeannette D. Schmelzle*, for the respondent.

1 Cases of the following petitioners are consolidated herewith: Three G Trading Corp., Transferor, docket No. 5530-86, and Gary Glass and Dale Glass, docket No. 27170-86.

MEMORANDUM OPINION

TANNENWALD, *Judge*: The disputes herein involve the Rule 155 computations mandated by the Court's opinion (T.C. Memo. 1988-550).

We deal first with the difference between the parties in respect of docket No. 27170-86. Respondent's proposed decision is that there is no deficiency in the 1982 Federal income tax of Gary and Dale Glass (the Glasses). This proposed decision rests on the fact that respondent has conceded the basis of the determination of deficiency, namely, that $1,281,422.00 of the $3,209,535.00 distribution in liquidation of Three G Trading Corp. (Three G), reported as long-term capital gain, should be taxable as ordinary income by way of forgiveness of indebtedness.

The Glasses have submitted, in docket No. 27170-86, a decision that there is an overpayment of $556,808.00 in their 1982 Federal income tax. Although we have not been favored with a computation showing the details to support the calculation of such amount, it appears that this decision is based upon the claim that the long-term capital gain plus $61,454.00 short-term capital gain reported by the Glasses for 1982 should be eliminated because of the following statement in our prior opinion:

> With respect to 1982, respondent has conceded that the gains for that year should be reduced by

the losses disallowed for 1980. See *Glass v. Commissioner*, 87 T.C. at 1177. The result of this concession is to eliminate any gain for 1982. [16]

* * *

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[16] The net gains for 1982 were $3,055,400, and we have disallowed losses of $3,320,000 for 1980. The impact of the concession and our decison on 1981 can be accounted for in the Rule 155 computation.

The foregoing position of the Glasses is without merit. What that seek to do is to capitalize on the literal language of one sentence in our prior opinion taken out of context. Our entire opinion (T.C. Memo. 1988-550) was devoted to issues relating to the tax liabilities of Three G ("petitioner" therein). The above-quoted sentence related to those related to those liabilities and was inserted for two reasons: (1) to make certain that respondent would be precluded from taking the position that the 1982 asserted gains should be recognized even though the losses were not, and (2) to provide the predi-

cate to our observation that we had no need to deal with the question whether, if the straddle transactions of Three G were recognized, there was an assignment of income in 1982 which fell outside section 337.[2] An examination of our findings of fact confirms that the figures set forth in the accompanying footnote relate to the gains and losses from the straddle transactions of Three G in 1980 and 1982 [3] and not to any gains or losses reported by, or claimed to have been those of, the Glasses. In short, the tax liabilities of the Glasses individually (as distinct from the liability of Gary Glass as transferee) in respect of those transactions were simply not involved. The hard facts are that neither Three G nor the Glasses reported any gains in 1982 from straddle transactions involved in the prior proceeding and consequently there were no amounts to which the 1980 losses from those transactions related. In sum, we reject the attempt by the Glasses to transpose the literal, and perhaps unartfully expressed, language from our opinion related to Three G into a tax windfall for themselves.

2 All section references are to the Internal Revenue Code as amended and in effect during the years involved or otherwise applicable to the issues dealt with herein.

3 It would appear that the figure of $3,320,000 should have been $3,321,200.

The other issue between the parties relates to the period during which interest (including interest as provided in section 6621(c)) acrues. Although Three G (petitioner in docket No. 5530-86) indicates in its proposed decision that the additional interest imposed by section 6621(c) should not accrue because of Three G's liquidation and dissolution, no argument has been submitted, nor are we aware of any authority, to support its position. As far as we can determine, the liability of a dissolved corporation for interest on deficiencies in tax continues to run until the date of payment, and it is clear that the additional interest under section 6621(c) is computed in the same way as interest normally accruing on deficiencies. See sec. 301.6621-1(c)(3), Proced. & Admin. Regs.

The main contention relating to interest is that of Gary Glass, Transferee, in docket No. 5529-86. Although we generally lack jurisdiction over issues involving interest, the issue present herein, i.e., the liability of a transferee for interest, is an exception to the general rule. See *508 Clinton Street Corp. v. Commissioner*, 89 T.C. 352, 354 (1987).[4] Relying on New York law, Gary Glass has submitted a proposed decision which provides for liability

4 The provisions of sec. 7481(a), enacted by sec. 6246 of the Technical & Miscellaneous Revenue Act of 1988, Pub. L. 100-647, 102 Stat. 3342, 3751, are not applicable.

for interest until January 11, 1982 (the date of the distribution to him in liquidation of Three G) and that no further interest should accrue from that date until the date demand for payment is made following the entry of decision. His reliance on State law (and we express no opinion as to whether his analysis of New York law is correct) is misplaced. It is well established that the *amount* of a transferee's liability, as distinct from the *existence* of such liability, is determined under the Internal Revenue Code at least where, as is the case herein, the value of transferred assets exceeds the amount of the transferor's liability, including interest, *Lowy v. Commissioner*, 35 T.C. 393 (1960); see also *Estate of Stein v. Commissioner*, 37 T.C. 945, 961 (1962). In *Ruderman v United States*, 355 F.2d 995 (2d Cir. 1966), affg. an unreported case (E.D.N.Y. 1964, 15 A.F.T.R. 2d 275, 65-1 U.S.T.C. par. 9154), relied on by Gary Glass, the value of the transferred assets was less than the transferee's liability.[5] Moreover, it is significant to note that the Second Circuit Court of Appeals based its affirmance on a concession by the Government and not the merits of

5 See *Satnick v. Commissioner*, T.C. Memo. 1979-97

the action of the district court in applying New York law. See 355 F.2d at 998. Accordingly, Gary Glass' liability for interest is governed by section 6601(a), which provides that interest on any unpaid tax shall be paid for the period from the date the Three G returns were required to be filed to the date of payment.[6]

Decisions will be entered in accordance with respondent's computations.

6 Interest will accrue under sec. 6621(c) only from Dec. 31, 1984. See *Solowiejczyk v. Commissioner*, 85 T.C. 552, 556 (1985), affd. without published opinion 795 F.2d 1005 (2d Cir. 1986).

Section 6072 (b) of the Internal Revenue Code provides in pertinent part:

> (b) **Returns of Corporations**. - Returns of corporations under section 6012 (persons required to make returns of income) made on the basis of the calendar year shall be filed on or before the 15th day of March following the close of the calendar year, and such returns made on the basis of a fiscal year shall be filed on or before the 15th day of the third month following the close of the fiscal year....

Section 6501 - Limitations on Assessment and Calculation

> (a) **General Rule**. - Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed...and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
>
> . . .
>
> (c) **Exceptions**
>
> (4) **Extension By Agreement**. - Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title ... both the

Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

Sec tion 6901. Transferred Assets.

(a) **Method of Collection**. - The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred.

(1) **Income, Estate and Gift Taxes**. -

(A) **Transferees**. - The liability, at law or in equity, of a transfer of property - (i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes)...